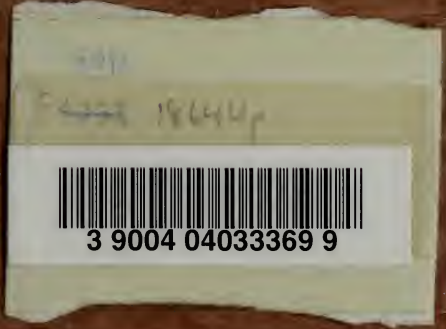

JUDGMENT

IN THE

COURT OF ERROR AND APPEAL,

FOR UPPER CANADA,

IN THE SUIT OF

THE GREAT WESTERN RAILWAY COMPANY OF CANADA,

(*APPELLANTS*,)

AGAINST

THE COMMERCIAL BANK OF CANADA.

(*RESPONDENTS*.)

TORONTO:

ROWSELL & ELLIS, PRINTERS, KING STREET EAST.

1864.

[CONFIDENTIAL.] *For information of shareholders only*

COPY OF Mr. CROOKS' LETTER OF DATE 11th MARCH, 1864.

After my first telegram this morning, the Chancellor intimated to Mr. IRVING and myself that the Judgment of the Court of Appeal was, "That the[x] plaintiffs are to have a new trial if they desire it, without payment of costs, or if "the[x] defendants desire a new trial, to be upon payment of costs; and if neither party makes an election by 1st April, "then a new trial upon payment of costs by defendants."

The effect of this is

1st. The law applicable to the case is now settled, viz., That the Great Western Railway Company, through BRYDGES and REYNOLDS, are liable to the Commercial Bank for all its advances on the account in question, to the extent to which they were not covered by Bills of Exchange on England. Assuming the payments made by G.W.R. Co. cheques in Canada as equivalent to a similar amount of Exchange, then the amount recoverable on this declaration of the law will be about $600,000, with interest for say four years.

2nd. That the question of the account not being before the Court of Appeal, it could not make any order by which the amount should be settled by it.

3rd. That the Court of Queen's Bench, on the award before it, could not do more than simply verify the correctness of the arbitrator's finding as to the amounts simply, and so it was not possible to give the Court of Queen's Bench, in connection with the application as to the award, any jurisdiction to modify it in accordance with the law laid down by the Court of Appeal.

4th. That the only other course left open, by which the amount payable to the Bank could be ascertained, was by the finding of a jury thereon, and so technically there must be a new trial.

5th. On such new trial, the defendants could still contest the correctness of the finding of the former jury as to the facts, but there is little probability that they would do so, for it would be a hopeless proceeding, and on the law, as the Judge at the trial *must* lay it down, the verdict must now inevitably be in favor of the Bank, the amount of that verdict being determined simply by a calculation of the amount of Sterling Bills not passed by the Bank in reduction of its advances.

6th. If the Great Western Railway Company should appeal to the Privy Council against the present decision of the Court of Appeal, it would have little prospect of success, as in the present judgment the objectionable points presented by the judgment of the Court of Queen's Bench have been entirely removed.

7th. The Court threw out a suggestion that the parties could doubtless settle upon the amount themselves without the expense of further proceedings, but from the obstinacy of the Great Western Railway Company advisers, I do not think this possible.

x *Plaintiffs - C. B of Ca*
Defendants - G. W. R. Co

[Circular No. 70.]

Commercial Bank of Canada,

Kingston, 23rd March, 1864.

Thomas Kirby, Esq.,
Manager,
Montreal Branch:

Dear Sir—

You have been put in possession of copies of the recent Judgment of the Court of Appeal in the case of this Bank *vs.* the Great Western Railway Company, as also of the Judgment of Chief Justice McLean, and the observations made by Mr. Justice Hagarty. These documents have been transmitted for the information of Shareholders in your vicinity who may make inquiries on the subject. If desired, let them read this circular, which will assist them in forming a correct opinion upon the position of the case, and the reasons which have guided the Board in adopting the course determined upon. This circular has been delayed for some days in consequence of the absence of several of the Directors, whose views had to be ascertained before a decision could properly be made.

You will observe that the effect of the decision in Appeal is to establish conclusively the correctness of the position all along assumed by the Bank, that the account through which the advances were made, was, in its inception, and during its continuance, the account of the Great Western Railway Company, *not* that of the Detroit and Milwaukee Railway Company. Also that the Directors of the Great Western Railway Company, Messrs. Brydges and Reynolds, who had the management of the loans of £100,000 and £150,000 sterling, authorized by that Company, were fully empowered to deal with the Bank to the extent of those loans, and that the portion of them not drawn through the Bank—amounting, according to our views, with interest, to $750,000—the Bank is entitled to recover. But the judgment prescribes, that unless the parties can agree upon the amount for which the Great Western Railway Company is liable, under the opinion expressed by the Court of Appeal, there must be a new trial to fix the amount.

You will observe also that the Court of Appeal threw out the suggestion that the parties might themselves agree upon the amount, without the expense of further litigation, and a formal request has been made by the Solicitor of the Great Western Railway Company, to defer further proceedings, until the Directors in Canada shall have had an opportunity of consulting the Directors in England, on the subject of the suit. But in connection with the course which the Bank Directors have resolved to take, it was unnecessary to comply with this request; a full opportunity of consulting the Great Western Railway Company Directors in England being open to the Directors in Canada, before the Bank's proceedings can have advanced to any great extent.

The Directors of the Bank consider that, from the extreme views taken by the Great Western Railway Company, that Company would not pay even the modified amount indicated by the judgment of the Court of Appeal, and thus that there must of necessity ultimately be a resort to the Privy Council. Besides, it has been the practice of the Great Western Railway Company, in respect of important verdicts against them, to carry nearly all the cases to the Judicial Committee of the Privy Council. It has been quite understood that the same course was to be followed in the present case. If the Bank consented to have a new trial now, although the verdict under the ruling of the Judge in accordance with the principle enunciated by the recent judgment, must inevitably be in favor of the Bank; still there can be no doubt that, as before, every obstacle and delay would be resorted to on the part of the Great Western Railway Company, and that in the end the case would be taken to the Privy Council by them.

Again, apart from minor points, the Bank's Counsel advise, that in the Judgment, the Court of Appeal, in discriminating regarding the amount to which the Bank is entitled, has exceeded its jurisdiction as an Appellate tribunal, inasmuch as, in doing this, it gave effect to an objection to the Bank's recovering the full amount claimed by it, which was not taken at the trial, nor raised in the Queen's Bench; and Mr. Justice Hagarty, in the observations made by him in the Court of Appeal, especially recognises this.

There are other objections to the finding of the Court of Appeal, but this is not the place to discuss them.

The case was fully elucidated at the trial before the jury, and at the several arguments. There is nothing new to be brought out on either side. It therefore appears to the Directors, that it would be simply a waste of time and money to go into a new trial now, when the case can be brought before the Judicial Committee of the Privy Council at once, and be heard in August. Moreover, the Directors have been advised by eminent Counsel in England (who gave an opinion based upon the facts as in printed report of the trial in 1862), that, irrespective of decisions in Canada, there is no reasonable doubt of the result before the Privy Council, from decisions given in former cases, where the main points were analogous to those in the present case. Besides, it is well known that the scope of the decisions of the Judicial Committee has been, not to allow any Corporation to evade payment of liabilities in cases like the present, where advances have been made at the request of its recognised executive officers, (and Messrs. BRYDGES and REYNOLDS were also Directors), particularly where the property created by these advances had been for the benefit of, or was actually, or practically held by, the Corporation seeking to evade payment on the plea of want of authority on the part of its Officers or Directors.

Again, as carrying out the principle affirmed by the Court of Appeal, might involve a considerable loss to the Bank, the Directors, in their capacity of Trustees for the Shareholders, consider it their duty to use all the means at their command to prevent such a loss. Under all the circumstances, they have unanimously resolved to instruct Counsel to appeal from the judgment of the Court of Appeal in Canada, and to carry the case at once before the Privy Council in England, where a decision may be looked for in a short time after the argument has been had. The Directors are advised by Counsel, that there is every prospect the recent judgment will be reversed.

Instructions have been given to the Bank's Counsel in conformity, and I cannot but think the course adopted by the Board will commend itself to the good sense of every Shareholder.

The Directors considered it their duty to state these things at once, and I need scarcely add that any further information which the Shareholders may require will be furnished at the Annual General Meeting in June next.

I am, Dear Sir,

Yours faithfully,

C. S. Ross,

GENERAL MANAGER.

GREAT WESTERN RAILWAY COMPANY

vs.

THE COMMERCIAL BANK.

VANKOUGHNET, C.—The facts in this case, so far as they are of any importance, are sufficiently set forth in the judgment delivered by my brother *Hagarty* in the court below, and I need now mention only such of them as will render plain the reasons for the decision at which we have arrived. The appellants were incorporated as a company to construct and maintain a railway in Canada. The third section of the act 16 Victoria, chapter 3, relating to the company, after reciting "for the avoidance of doubt," declares and enacts, "that the company have had and shall have power and authority to borrow money from time to time for making and completing, maintaining and working, the railway as they might or may think advisable, and to pledge the lands, tolls, revenues, and other property of the company, for the due payment thereof, and might and may make the bonds or debentures issued by the company for securing the payment of any sums so borrowed, or to be borrowed convertible into stock of the company on the terms and conditions expressed or to be expressed in such bonds or debentures, or in the by-laws of the company, and might and may insert in any bonds or debentures issued, or to be issued by them, such terms and conditions of any kind whatsoever as they might or may think most for the advantage of the said company." This, with the limitation prescribed by the 4th section of 22 Victoria, chapter 116, is the only provision of law which I can find that authorises the Great Western Railway Company to borrow money; and, as will be seen from it, such borrowing is for the purposes proper of the company. The company

conceiving that the Detroit and Milwaukie Railway running through the State of Michigan, and separated by the Detroit River from the extreme western terminus of the Great Western Railway would be an important feeder to it, and a most important connection in its business with the Western States, resolved upon advancing money for the completion of that line of road and its effective working; and, accordingly, at a general meeting of the proprietors of the Great Western Railway Company, held in London, England, on the 1st of October, 1857, and at a meeting held at the company's office in Hamilton, Canada, on the 2nd of November, 1857, it was resolved, "That the directors be authorised to advance to the Detroit and Milwaukie Railway Company, such an amount not exceeding £150,000 sterling as may be necessary to ensure the completion of the railway across Michigan in connection with the Great Western Railway of Canada; such advance being made as a temporary loan, and on sufficient security; the expenditure of the same being subject to the control of the Great Western Railway Company." That the Great Western Railway Company had, at the time of the passing of this resolution, no right or power to appropriate their funds to such a loan or to borrow money to effect it, I think, no one will dispute. They were not empowered by the legislature to appropriate any portion of their capital and stock, or funds to sustain a railway or any enterprise in a foreign country or beyond the limits of their own road; and, for the purposes of their railway only, were they authorised to borrow at all. I think also it cannot be doubted that any one contracting with them to advance money to the Detroit and Milwaukie Railway on the strength of such a resolution, or of any guarantee or contract that might have been made under it, could never have held the Great Western Railway Company responsible for such advance if made. Were the subject otherwise

open to doubt, I think the statute 22 Victoria, chapter 116, section 11, removes it: for there, all parties, as also the legislature, seem to have considered that an act of parliament was required to legalise the advance which had been made under the resolution referred to. That section is in the following words:

"And whereas the Great Western Railway Company, in order to form connections with railways in the United States of America, has to lay down its rails out of the province of Canada, and to provide facilities at stations and otherwise, for consolidating its traffic; therefore the Great Western Railway Company shall have full power and authority to use its funds, by way of loan or otherwise, in providing proper connections, and in promoting its traffic with railways in the United States of North America, provided that no such expenditure shall be incurred unless sanctioned by a vote to that end of two thirds of the shareholders voting in person or by proxy at a general meeting of the shareholders specially called for that purpose; provided always, that the power hereby granted shall not be construed so as to prevent any other railway company from using its funds in providing the same connections, and promoting its traffic with railways in the said United States; and provided also, that whenever any other railway company shall desire to make such connections, the said Great Western Railway Company shall be bound to assent to the same on equitable and reasonable terms; and provided further, that the loan of seven hundred and fifty thousand dollars already made by the said Company to the Detroit and Milwaukie Railway Company is hereby declared to be lawful."

It will be observed that while authority is thus given to *lend* money, no authority is given to *borrow* money for the purpose of lending or otherwise, and this is a most important distinction in my view. It is one thing to authorise a company to lend out of its own funds, but it is quite another thing to enable it to go beyond these and the amount of its authorised capital stock, and

encumber the undertaking with a load of debt which may utterly paralyse it and render it worthless to the stockholders and useless to the public, whose interests in such enterprises have a large part in legislative consideration. There are certain trading concerns, incorporated or not incorporated, the nature of whose business assumes, nay even requires, that they shall become borrowers or holders of moneys from others, at interest, or not, as may be agreed upon: and in such cases authority in them to that end is implied. But when a company is authorised to raise among subscribers to its stock a certain sum of money and therewith to build a road, I am not aware of, nor have we been referred to, any authority which decides that they need not by such subscription to stock procure the necessary funds, but that, without any legislative sanction therefor, they may borrow money for the purpose. If then the company could not without express authority, borrow money to build its own road, could it borrow money to build a road for some one else? The statement of the proposition carries with it the answer. While we must, I think, treat the first loan of £150,000 sterling, to be the loan of $750,000 referred to in the statute of 22 Victoria, and ratified by it, it would not necessarily follow that the borrowing of it from the respondents was thereby justified. We cannot assume that the legislature knew how the loan had been effected, or that it had been obtained otherwise than out of the surplus funds of the company. It has been argued that the powers to borrow given to the company by the statute of 16 Victoria, enable the company to borrow money with which to make the loans authorised by the 11th section of 22 Victoria, chapter 116. In my own opinion this is not so, though I believe some of the members of the court take the contrary view. I think the company were authorised to use only its own funds for these loans, and could not create such funds by borrowing them. But, however

this may be, we think the fair way to deal with the loans authorised under the resolution of the company already mentioned, and also under the resolution in England, of the 7th of October, 1858, by the proprietors there, confirmed by the resolution in Canada of the 2nd of November, 1858, to the effect "That the directors be authorised to advance to the Detroit and Milwaukie Railway Company a further sum of money not exceeding £100,000 sterling, to be expended by and under the control of the Great Western Railway Board of Directors," is to assume that the company had in England properly provided or arranged for the funds, by an increase of share capital or otherwise, to meet those loans, and that the money was available there for that purpose. There is nothing to the contrary shewn, and I think we cannot infer that they contemplated or were doing any thing illegal in furnishing or procuring the money. I think also we should assume that these resolutions were regularly passed, and by proper authority: their legality has not been questioned before us. Adopting then this position, we must, I think, hold that the directors of the company as the authorised agents of the shareholders were to arrange how this money so agreed to be loaned was to be advanced from time to time, as well in regard to amounts and times of advance, as to the method by which the money was to be procured from England to be made available in Canada, and in the locality where its expenditure was to take place. The body of shareholders could not discharge this ministerial duty, though it required the exercise of some judgment. The directors themselves, numerous as they were, could not collectively receive or disburse the money; and hence it became necessary for them to select sub-agents through whose hands the money should pass, and who should be authorised to receive it. They did select for this purpose, Mr. *Brydges*, the managing director of the company, and

Mr. *Reynolds*, who had charge in Canada of its finances. These gentlemen, for we may take it that they were acting in concert throughout, in the month of December, 1857, proposed to Mr. *Ross*, cashier of the bank of the respondents, to advance to the Detroit and Milwaukie Railway Company sufficient money for their requirements, and exhibited to him the resolution of the Great Western Railway proprietory, sanctioning the loan of £150,000 sterling. What passed at this interview, at which Mr. *Reynolds*, but not Mr. *Bridges* personally, was present, is narrated by the parties thereat in statements most opposing. This much, however, we can arrive at, that the final arrangement between the parties was that an account was to be opened in the name of the Detroit and Milwaukie Railway Company, with the term "account Great Western Railway Company" superadded, and that any balances overdue on the account after crediting traffic receipts of the Detroit and Milwaukie road paid in were to be covered by bills of exchange on England, at least to the extent of the £150,000 sterling. An account in accordance with this arrangement was opened by the bank, and the moneys paid out upon it from time to time were so paid upon cheques, by or on behalf of the Detroit and Milwaukie Railway Company, and not the Great Western Railway Company. It is admitted, if not proved otherwise, that the bank had notice of the two resolutions of the Great Western Railway Company for the loans to the Detroit and Milwaukie Railway company, and on the strength of the first resolution the original arrangement was made. We are of opinion that the bank are entitled to recover the amount of the loans authorised by these two resolutions, but no more. I do not think that the proprietors in England, nor perhaps the directors there or here contemplated the effecting any loan in Canada to meet these amounts. Indeed we proceed on the assumption that they did not; and that they had, or had arranged to have, the money in

hand in England. The evident intention was, that when there were no surplus funds of the Great Western Railway Company, in Canada, which could be applied upon the loan authorised, bills should be drawn upon the company at home to procure the required amount. But, as I have already said, we must treat the directors as having authority to arrange the mode in which this should be done, and as having power to authorise, and as having authorised, Messrs. *Brydges* and *Reynolds*, as their agents, to act here for them to that extent. These gentlemen then seem to have procured immediately from the respondents, and afterwards from time to time, as was required, money to satisfy these loans, upon the understanding and promise that any balance due to the bank after crediting moneys deposited on account should be re-paid or re-placed by exchange on England. Messrs. *Brydges* and *Reynolds*, we think, had received authority to draw bills of exchange to the amount of these loans, and might have done so, and sold them to the bank. Instead, however, of taking this course, they procured the money from the bank on the faith of this exchange being given. They in fact sold the bills with the promise to deliver them, and the bank advanced the money in anticipation of receiving them, and we think that that promise and that anticipation should be fulfilled; and that for so much of the £250,000 sterling named in the resolutions referred to as has not been re-paid to the bank, they, the respondents, should have a verdict, the jury having found upon evidence properly submitted to them, that the credit for the moneys so advanced was given to the Great Western Railway Company, and not to the Detroit and Milwaukie Railway Company, notwithstanding the form of account adopted. I cannot, however, part from this branch of the case without stating that I have had great difficulty in concurring in the right of the bank to receive any thing more than the $750,000 of loan made legal by legislation, and I

have still doubt as to whether the authority given by the statute of 22 Victoria authorised any such further loan. It gives the company power to lay down rails out of the province, and to provide facilities at stations, and otherwise, for consolidating its traffic; but I think it is open to very grave doubt whether they have authority to make loans to independent companies to complete their line of road. If they have, I see nothing to prevent them extending aid for constructing a railway to the Pacific, whose traffic might pass over their road, and be thus of great advantage to them; and so to any other roads, even to the building of them when it could be shewn that their existence would be of benefit to the business of the Great Western Railway Company. I do not think that the sanction of the previous loan implies, and it certainly does not confer any authority to make another such loan, but if any thing the contrary. The legislature simply confirms what had been done, but it does not say "go and do likewise," though I admit it is difficult to put any limitation on the loan of funds which the act permits; but considering how foreign such application of the funds is to their use or destination, as contemplated by the charter of the company, I think this provision of law should receive as strict and limited a construction as is consistent with its terms.

I do not see on what ground the sums advanced by the respondents, for the Detroit and Milwaukie Railway Company, beyond the £250,000 sterling, can be recovered. The respondents had not only notice that the moneys they were advancing were to be expended for or by the Detroit and Milwaukie Railway Company, but they actually paid those moneys to the latter company, on cheques drawn on its behalf, as expressed on the face of them. They were bound to take notice of the act of parliament which gave the Great Western Railway Company authority to expend its funds out of the

province for the purposes referred to in the section of the act already quoted, and which provided that such expenditure could not be legally incurred unless sanctioned by a vote of two-thirds of the shareholders; they knew that the shareholders had already passed two resolutions, limiting the amount of the loan which should be made by the one company to the other, and they did not know, and could not know, of any authority justifying a further advance, for none such existed. What right, then, had they dealing alone with two officers of the company, without ascertaining their authority, to charge or seek to charge their principals with such advances made for such a purpose? Ordinarily agreements by corporations should be under their respective seals; exceptions being admitted in regard to such transactions in the course of their every day business as would render such a formality inconvenient and an obstruction. But can it be said that a transaction of such magnitude as took place here between the two or three corporations involved in it would fall within any such exception? When a party, dealing with a corporation or rather with the officers of a corporation in the irregular manner in which the respondents here dealt, seek to charge that corporation with responsibility for the acts of those officers, I think the corporation may fairly be allowed to say, shew by what authority those officers used our name and pledged our credit; have you any resolution by us authorising it, or even any instrument under our seal, authenticated in the usual way by our representative for that purpose, sanctioning such dealing? This is not the case of a party contracting with a corporation in a matter within the scope of its objects and powers where every thing appears to be regularly and formally done, but there happens to be a non-compliance with some regulation, rule, or provision which has been established for the governance of the corporation or of its officers, and of

which the party so contracting had no notice. Here was a most irregular course of dealing on the part of the bank, and in a transaction not in, but out of the ordinary course of business of the Great Western Railway Company, and one of a most special character, and only to be permitted or justified under and in compliance with a particular provision for that purpose made by legislative enactment, which the Bank were bound to know. It is not the case of the Great Western Railway Company over-drawing its own account which may have fluctuated from week to week or day to day, and suddenly stopping it with a balance against them. Disguise the matter as either party may, the advance in this case was not for the purposes proper of the Great Western Railway Company, but to or for the Detroit and Milwaukie Railway Company ; and is not therefore the case of a mere overdrawn account, but the case of a loan directly and deliberately made, if not to, at least for, the last named company, to be covered by deposits or exchange. The truth, I think, is that both Mr. *Ross* the President of the Bank, and *Brydges* and *Reynolds* indulged in the hope that the receipts of the Detroit and Milwaukie Railway would, with the £250,000 sterling loan, cover all the advances which the Bank would from time to time make, and that in this faith the account was carried on. Disappointed in this, the Bank seek to enforce payment of the moneys they have lost from the company; and the officers of each corporation are found giving most contradictory statements of what passed between them, influenced doubtless by the views which they respectively took at the time they embarked in the transaction, but which they, it seems, did not make sufficiently clear the one to the other. It is said, however, that the Great Western Railway Company have got the benefit of this money, and that it was advanced at all events with the knowledge of the directors, and that the shareholders subsequently ratified its expenditure. I think

none of these positions sustained. The money was not expended on the road of the Great Western Railway Company, or on any of their works or property, and it cannot therefore be said that the company by such expenditure have so much more property. It was loaned to a company in whose welfare they doubtless had or thought they had an interest, as they had in all roads which could in any way be brought into connection with their own, or lead traffic to it, but this was not an using and enjoyment by them of money expended on their own property. There is no evidence to shew that the directors ever knew of the state or even of the existence of the account opened with or on behalf of the Detroit and Milwaukie Railway Company. On the contrary, those of them who were examined as witnesses had never heard of it; and the account being kept separate from the Great Western Railway Company's account proper, which was alone from time to time submitted to the Directors, the Bank enabled the officers of that company with whom they dealt to keep the directors in ignorance of these advances. The proprietors never sanctioned the advances which were made, and for aught that appears never knew of them till this suit was instituted; and it does seem a monstrous proposition that the superintendent of a railway or any other company, whose business is not the borrowing or lending of money, can involve the shareholders in any amount of liability which he in his recklessness may chose thus to incur. The shareholders expressly limited the amount for which they were willing and intended to be liable, and the board in England again and again forbade Mr. *Brydges* and Mr. *Reynolds* going beyond it. Every precaution to prevent any excess was taken, and yet in the face of all this we are asked to make the corporation responsible not merely for the unauthorised but for the forbidden acts of their officers. The report of the directors in answer to certain charges of a committee of investigation, which was

relied upon as shewing knowledge and acquiescence by the shareholders, shews the contrary. In that report they are expressly informed that the expenditure on the Detroit and Milwaukie railway consisted of the £250,000 sterling loan, and an additional sum produced from traffic receipts and moneys obtained in America, not by or on the credit of the Great Western Railway Company, but by the Detroit and Milwaukie Railway Company. We think there was neither previous sanction nor knowledge from time to time, nor subsequent ratification by the shareholders, or even the directors, of the dealings between Messrs. *Reynolds* and *Brydges* and the Commercial Bank in respect of this Detroit and Milwaukie railway account; and that therefore for any sum beyond the £250,000 the appellants are not liable.

As to the evidence objected to, we think that the entry in the Commercial Bank books of the minute of the Board of Directors in regard to the application made by Mr. *Reynolds* to Mr. *Ross* to open this account was properly received in evidence. It was an entry made at the time, and initiated and authorised the transaction on the part of the bank; and as shewing what they had agreed to do, and had authorised their own officers to do, we think it admissible, being part of the *res gestæ*.

The other two pieces of evidence objected to, viz.: the monthly statement of the bank's transactions at the Hamilton agency in which appears the balance of the Great Western Railway account, and the first advance of $10,000, stated there to be to the Detroit and Milwaukie railway, and the report made to the shareholders already referred to, we think were unimportant, and if they had any bearing at all in the case were rather in favour of the appellants who object to them. The view which we have taken of the rights and liabilities of the parties was not presented to the court below, nor indeed

was it prominently discussed before us. Each party seem to have rested upon the extreme rights claimed by them. The one to the full amount of the money advanced: the other to freedom from liability for any thing. The court below thinking the plaintiffs entitled to judgment for something, and without deciding what that was, refused, and properly, a nonsuit, and also refused a new trial, inasmuch as something was undoubtedly due to the bank, and a nominal verdict for it had been rendered, subject to the award of a referee, who was to fix the amount to be paid by the appellants, with power to report special facts. We think, however, that the extent of the liability of the appellants upon the evidence furnished should have been declared by that court, as we now find it, and that in this view there must be a new trial, unless the parties, under the opinion now expressed by us, will pay the amount for which we think the defendants can be alone made liable, or choose to ascertain it by a reference, or, in case any additionl facts likely to vary the opinions we have expressed can be furnished, choose to leave them to be ascertained or reported also by a referee. Of course it is desirable that neither additional expense nor delay should be incurred, but unless the parties arrange otherwise, we have no alternative than to grant a new trial, and without costs.

The following note of the judgment of the Honourable the President of the Court who, from indisposition, was unable to attend at the time judgment was delivered, was read by His Lordship, Mr. Justice *Hagarty*.

McLean, *Prest.*—This case was tried before the late Mr. Justice *Burns*, at Kingston, in May, 1862, and was left to the jury with certain questions in writing, to which they were requested to give answers in writing.

1st. To which company was credit given by the bank, to the Great Western or to the Detroit and Milwaukie?

or was the credit given upon the responsibility of Messrs. *Brydges* and *Reynolds*, irrespective of either company?

2nd. Had Messrs. *Brydges* and *Reynolds* authority from the Great Western Railway Company to make financial arrangements for the Detroit and Milwaukie Company to the extent of £250,000 sterling, agreed to be loaned by the former to the latter company, and was the account of the Commercial Bank opened and conducted by them in pursuance of such authority?

3rd. Had the Commercial Bank notice at any time while the account was going on that Messrs. *Brydges* and *Reynolds* had exceeded their authority, or that more than the two loans, amounting to £250,000 sterling, had been expended?

4th. Suppose the original credit was given by the bank to the Great Western Company on the opening of the account, was there any understood limitation between the parties as to the question of liability at the time the letter of the 16th of December, 1858, was given, either to the extent of the second loan of £100,000 sterling or otherwise, or was the account continued after that period in the same manner as before by the parties.

5th. Did the Great Western Company by its dealings with the Detroit and Milwaukie Company reap the benefit of the expenditure made by the Commercial Bank on the Detroit and Milwaukie account.

The jury gave answers in writing to these queries.

To the 1st. That the credit was given to the defendants.

2nd. That *Brydges* and *Reynolds* had authority to open the account with plaintiffs, and that the account was

opened and conducted by them in pursuance of that authority.

3rd. That the bank had no notice that Messrs. *Brydges* and *Reynolds* exceeded their authority.

4th. That there was no limitation as to amount at the time the letter of the 16th of December, 1858, was given, and the account was continued in the same manner as before the date of that letter.

5th. That the Great Western Company by its dealings with the Detroit and Milwaukie Company did reap the benefit of the expenditure made by plaintiffs on the Detroit and Milwaukie account.

On the finding of the jury in favour of the plaintiffs of the several points submitted to them, a verdict was entered in their favour subject to be entered for such amount as shall be ascertained upon a reference, as agreed on. The agreement as to such reference is endorsed on the record, as follows: "It is agreed by the counsel for the parties in this cause that the amount for which a verdict shall be entered, if the plaintiffs shall be entitled to a verdict, shall be ascertained by a referee, to be chosen by the parties respectively, in term or otherwise, and if the parties cannot agree upon a person for that purpose, then it is agreed between the parties that I shall nominate the referee as upon a compulsory reference. The referee to have power at the request of either party to report upon the different classes of the account, such as amounts paid upon coupons, upon cheques, upon promissory notes or otherwise, and to draw up a statement of facts upon each, for the opinion of the court."

In Easter Term last, a rule *nisi* was obtained calling upon the plaintiffs to shew cause why the verdict should

not be set aside and a nonsuit entered pursuant to leave reserved at the trial on various grounds. (*a*)

The judgment of the court was delivered Mr. Justice *Hagarty*, Mr. Justice *Burns*, and *McLean*, C. J., after mature consideration, concurring therein. This appeal is against that judgment, and the reasons for appeal and the respondents' reasons against the appeal are fully set out in the appeal book from p. 11 to p. 24, inclusive.

It appeared in evidence at the trial, and I believe is undisputed, that in August, 1857, an account was opened by the plaintiffs with the Great Western Railway Company, under the sanction of the Canada board of directors, and this seemed to have been done in consequence of the Bank of Upper Canada, with which the Great Western account had been previously kept, refusing or declining to make further advances until the amount of overdrafts were arranged. This was done through the plaintiffs, who assumed on behalf of the defendants the whole amount of such overdrafts. In the month of December, 1857, the plaintiffs were informed through their agent at Hamilton, that the financial director of the defendants wished to make an arrangement for drawing moneys voted by the shareholders in England for the Detroit and Milwaukie Railway Company, in order that that company by the completion of its road should be brought into connection with the Great Western Railway Company. In consequence of that communication, the plaintiffs' cashier came up from Kingston to Toronto, where by appointment he met the financial director of the railway, Mr. *Reynolds*, and the agent of the bank at Hamilton. The cashier of the bank and the agent at Hamilton give testimony as to what the arrangement was with respect to the account

(*a*) See report of the case, 22 U. C. Q. B. R. 236.

for the Detroit and Milwaukie Railway Company, in which they perfectly agree, but Mr. *Reynolds* gives a totally different version of the transaction, and states positively that the name of the Great Western Railway was not mentioned in connection with the arrangement respecting the moneys to be advanced for the completion of the Detroit and Milwaukie Railway from the loans made for that purpose by the shareholders in England. In the statement of Mr. *Reynolds* as to what took place at the meeting between him and Mr. *Ross* at Toronto, he says, (p. 67,) that at that meeting he saw Mr. *Ross*, and took with him a *statement* and the *resolutions* of the Great Western board relative to the *loans* which Mr. *Brydges* and himself were instructed to employ in the completion and equipment of the Detroit and Milwaukie road. Mr. *Reynolds* may have inadvertently referred to *both loans* and the *resolutions* by which the London board decided upon their being made, but at the time of the meeting, 29th December, 1857, only one of the loans, for £150,000, had in fact been made; that loan was under a resolution of the English board of the 8th of October, 1857, assented to at Hamilion by the Canadian board on the 2nd of November, 1857, and at the meeting at Toronto of the 29th of December, it could not possibly have been known that a further loan for a similar purpose would be made to the Detroit and Milwaukie Railway Company to be expended by the same persons, the agents and servants of the Great Western Railway Company.

When the loan of £150,000 was made, and Messrs. *Brydges* and *Reynolds* appointed as agents for expending it, some mode must have been contemplated for transferring the amount to Canada, where the agents lived, who were entrusted with the expenditure, and it is not unreasonable to suppose that the agents were instructed to draw for the amount, as required, by bills

of exchange. That they had authority to draw, is evident from the minutes of the English board, of the 18th May, 1858, (appendix, page 30,) at which it is stated that "a letter was written by the board to Mr. *Pollard*, manager London Joint Stock Bank, advising him of the maturity on the 20th May, instant, of the draft of Messrs. *Brydges* and *Reynolds* on Detroit and Milwaukie loan account, accepted by the board for the sum of £6,000," requesting him to enter the same to the debit of the company. Again in the minutes of the same board on the 12th April, 1859, is a similar minute in reference to a draft of Messrs. *Brydges* and *Reynolds*, for £20,000, accepted by the resolution of the board, and falling due on the 17th April. The board, by accepting the drafts of their agents, must be supposed to have given them, as individuals, a right to control the moneys which they were authorised to expend, and if the plaintiffs, knowing them to have such authority, advanced from time to time, on their request, moneys to be expended in carrying out the views of the board in making loans, I cannot think that the plaintiffs, as bankers, were bound to ask what particular work, or for what particular object the amount was to be applied. That a large amount was advanced by the plaintiffs for an object in which the defendants were deeply interested, is manifest, and if the defendants' agents have exceeded their authority, the plaintiffs having no notice of that fact, ought not to lose the amount of their advances. The defendants were extremely anxious to have the Detroit and Milwaukie Railway completed, under a conviction that it would form a most valuable connection with the Great Western, and when they agreed to make the first loan of £150,000 sterling, it was under the impression that that would be sufficient. Subsequently a further loan of £100,000 was sanctioned, for the purpose of equipping the road, and providing stations. If, then, any portion of the latter loan was

in fact expended in completing the road, such expenditure might be considered as contrary to the intention of the shareholders and *ultra vires*, but the plaintiffs could not, in advancing the moneys, be considered as parties to the misapplication of the money, and on that account not entitled to recover.

The jury have found, upon the trial, that Messrs. *Brydges* and *Reynolds* had authority from the Great Western Company to make financial arrangements for the Detroit and Milwaukie Company, to the extent of £250,000 sterling, agreed to be loaned by the former to the latter company, and that the account with the plaintiffs was opened and conducted by them in pursuance thereof. There was abundance of evidence before them on that point, and I think the finding is correct.

In August, 1857, the company's account was transferred from the Bank of Upper Canada to the Commercial Bank, and when, in December following, the intelligence was received of the Great Western Road, in London, making the loan of £150,000, it was quite natural that Messrs. *Brydges* and *Reynolds* should avail themselves of the company's bankers, for the purpose of getting the money to be expended by them. On the 29th December, the interview between Mr. *Ross*, the cashier of the bank, and Mr. *Reynolds*, took place, when the arrangement was effected respecting which the witnesses differ so very materially. Judging from the testimony, I cannot but think the testimony of Messrs. *Ross* and *Park* entitled to prevail. Certainly it would be extraordinary if Mr. *Ross*, on the very first occasion of his meeting Mr. *Reynolds*, and without consulting with the directors of his bank, and with the knowledge that £150,000 sterling was awaiting the drafts of Messrs. *Brydges* and *Reynolds*, to be expended by them, should, nevertheless, consent to advance on the credit of the

Detroit and Milwaukie Company any amount which *Brydges* and *Reynolds* might require. It is much more reasonable to suppose that Mr. *Ross* should decline such a responsibility, and that he should make the proposition to place any amount of advances to the debit of the Great Western Company. There can be no doubt that the plaintiffs were entitled to a verdict for something, and that the application for a new trial was properly refused. The means of ascertaining how much the verdict should be for, was agreed upon between the parties, and is yet open; if the referee has included any objectionable items in his report, the court may refer the matter back to him with their opinion, and he will, no doubt, correct any error he may have made. I should be exceedingly averse to sending the case again to a jury; the interests of both parties seem to forbid it.

I do not see any sufficient grounds for the appeal, and therefore I am of opinion that it must be dismissed with costs. While I am obliged to come to this conclusion, I must acknowledge that the intimation given by both parties that the case will be still further appealed, affords me much satisfaction. The amount in dispute is very large, and the law, as to the liability of corporations, unsettled, and a decision from the highest court of appeal will go far to establish the law in such cases.

Hagarty, J.—I was not present at the argument, and therefore give no judgment; but I think it right to add to the judgment just delivered, that in the elaborate argument of the appellants in the Queen's Bench no distinction whatever was pressed on the court between the liability for the unpaid portions of the two loans and the residue of the claim. Nor, as far as the papers shew, was any such point made at the trial.

The voluminous grounds of nonsuit or new trial do not suggest it. It is clear there could not have been a non-

suit, and as to setting aside the verdict the plaintiffs were, it seems, entitled to recover about £100,000; so that in accordance with the views of the Court of Appeal, the judgment of the Queen's Bench was technically correct in discharging the appellants' rule.

The difficulty is created by the fact of the verdict being for a nominal sum, with a consent endorsed on the record that the amount for which the verdict should be entered was to be fixed by an arbitrator: "The referee to have power to report upon the different classes of the account such as amounts paid upon coupons, upon cheques, upon promissory notes or otherwise, and to draw up a statement of facts upon each for the opinion of the court."

In the view of the Court of Appeal the plaintiff cannot recover beyond the unpaid portions of the two loans, and unless some new facts can be given in evidence, if a new trial take place the judge must so charge the jury.

If the referee find the facts as he is impowered to do, the court can apply the law now declared to these facts, and so a new trial be needless; or perhaps if an award be made it could be referred back to the referee with a direction to find in accordance with the view of the law now declared.

On hearing the judgment of the court, the counsel for the plaintiffs urged that there should be no new trial, but that the referee already named, guided by the opinions expressed by the court, should fix the amount due to the plaintiffs, as both parties had at the trial by counsel withdrawn the question of amount from the consideration of the judge and jury, and had consented to a verdict

for one shilling, subject to be increased by the award of an arbitrator, who it is admitted was appointed.

The court on consideration ruled that if the plaintiffs desired a new trial it should be granted to them without costs. That if the defendants (the appellants here) desired a new trial it should be granted to them on payment of costs; but that if both parties consented, the case should be remitted to the arbitrator to ascertain the amount due to the plaintiffs (the respondents here) in accordance with the opinion of this court. That each party should elect and give notice to the other before the first day of April next, whether or not they would agree to the further reference; that the party giving such notitce should be bound thereby, and that if the appellants, the defendants below, did not give such notice before that day then a new trial to be ordered with costs to be paid by the appellants, the defendants in the court below.

The Commercial Bank of Canada v. The Great Western Railway Company.

Hagarty, J.—It may be convenient to notice in the first place the resolutions of the court of proprietors of the Great Western Railway Company authorising the lending of money to the Detroit and Milwaukee Railway Company.

The first is of the London date, 8th October, 1857, and Hamilton date of 2nd November, 1857, and sanctions an "advance to the Detroit and Milwaukee Company of such an amount, not exceeding £150,000 sterling, as may be necessary to ensure the completion of the railway across Michigan, in connection with the Great Western Railway Company of Canada; such advance being made as a temporary loan, and on sufficient security, the expenditure of the same being subject to the control of the Great Western Railway Company."

The second resolution, dated, respectively, London, 7th October, 1858, and Hamilton, 2nd November, 1858, authorises the board "to advance to the Detroit and Milwaukee Company a further sum of money, not exceeding £100,000 sterling, to be expended by and under the control of the Great Western Railway Board of Directors."

The statute 22 Vic., ch. 116, sec. 11, allows the Great Western Railway "to use its funds, by way of loan or otherwise, in providing proper connections, and in promoting its traffic with railways in the United States," when sanctioned by two thirds of the shareholders, &c.; and enacts "that the loan of seven hundred and fifty thousand dollars already made by the said company to the Detroit and Milwaukie Railway Company is hereby declared to be lawful."

A large portion of the argument for the defendants was directed against the legality of an employment of the means of the Great Western Railway Company in making or completing this foreign road;—and it was contended that in any event the defendants had no power to borrow money from third parties to effect such a purpose, and that the present plaintiffs, when they advanced the sums now sought to be recovered, had full notice of the alleged illegal destination of the money.

I think it well to dispose of this branch of the case first.

From August or September, 1857, down to the occurrence of the present difficulty, the plaintiffs had been the bankers of the defendants, and when the Detroit and Milwaukee account was first opened the resolution for the £150,000 was known to the plaintiffs.

The clause already cited of the act passed on the 16th of August, 1858, removed all questions of the legality of the first advance, and I presume is declaratory in its nature. It also prospectively gives full power to the Great Western Railway Company "to use its funds, by way of loan or otherwise, in providing proper connections, and in promoting its traffic with railways in the United States."

On the face of the second resolution, passed shortly after this statute, there is nothing to shew the special purpose of the £100,000 advance to the Detroit and Milwaukee Company. It is simply spoken of as "a further sum of money, to be expended by and under the control of the Great Western Railway Board of Directors."

The bankers of the Great Western Railway Company may be assumed to know that the legislature had expressly sanctioned a very large loan to the foreign railway: that it had been really intended to be used, and was used, not merely in making connections and promoting traffic, but in constructing and equipping the line itself: that the road required further aid, and that parliament allowed such aid for certain specified purposes: that the Great Western Railway Company had determined on a further advance of a lesser sum than that first loaned; and that the lenders were to have the actual expenditure of the money. Such money *might* very well be applied strictly within the words of the statute, though it may be safely assumed, from looking over the items of account, that large portions at least were applied in the general construction and equipment account, and in payment of debts due by the Detroit and Milwaukee Company. Among the exhibits in evidence I find a copy of a resolution of the English board of the 12th of October, 1858, stating that the second loan of £100,000 was granted specifically to provide rolling stock and station accommodation to the line of railway opened by the aid of the former grant. There seems to be

no evidence of this resolution, passed five days after the voting of the second loan, being made known to the plaintiffs.

I have a strong opinion that, independently of the express sanction of the first loan, the application of the Great Western Railway Company's moneys actually to construct and equip the Detroit and Milwaukee line was not within the plain meaning of this eleventh clause, and that any shareholder applying within a reasonable time to a Court of Equity could have restrained such a proceeding. The legislature never could have contemplated, under such words as "providing proper connections, and in promoting its traffic with railways in the United States," that a Canadian company should apply its means towards the building of a road 187 miles long across the state of Michigan. But the end of the clause expressly legalises the loan already made, without any statement as to its object.

It is quite true that after the bankers had agreed to make advances, and as the drawing of the money from them proceeded, they might apprehend, from the nature of many of the payments made through them, that the money was being applied to questionable purposes. For example, many charges occur in the account before us for coupons of the Detroit and Milwaukee Company paid through the bank. Such payments might hardly come within the permissive words of the act, but we must consider the position of the parties, bankers and customers. Having once agreed to make advances, without notice of any intended illegality, and aware that large sums might be required for perfectly allowable objects, it seems hardly consistent with our ideas of the requirements of business that we should hold the bankers or their clerks bound to scrutinise every cheque presented or every account directed to be paid, with a view of ascertaining if it came within the lawful powers of the customers' charter.

Being permitted to advance money to the foreign company for lawful purposes, it might well be that by some arrangement between the companies some of the moneys contracted to be expended in making connections, &c., might be handed back to the Great Western Railway Company to be applied by them in retiring a certain number of coupons, the foreign company in lieu thereof itself finding an equal

amount of funds to do the work first agreed to be done by the Great Western Railway Company.

Or, in another aspect of the case, it may be well to consider whether, in consequence of previous arrangements or advances with which the plaintiffs had no concern, the Detroit and Milwaukee company had, as it were, fallen into the hands of the Great Western Railway company, and the latter had the alternative either of completing the road or losing altogether the large sums already spent upon it. The court of proprietors of stock sanction a large advance to aid the foreign road: parliament, after some delay, expressly sanction this advance, which is expended in endeavouring to complete the road: the shareholders consent to a further loan; and the bankers through whom the first loan is expended, are applied to to furnish funds from time to time on the faith of this new vote. It seems to me that in such a case to decide against the bankers' right to be repaid their advances would be pushing the *ultra vires* doctrine further against third persons than it ever has been previously urged.

Or, again, if a railway company without parliamentary sanction, and even if liable to be restrained by equity on application of its own stockholders, as a matter of fact under the authority of a vote of the shareholders take possession by arrangement of a wholly independent line, and work it with their own funds and under their own officers, and make payments from day to day by cheque on their ordinary bankers, with whom their own proper account is kept, I hardly see my way to agree that the bankers are bound to enquire into the purpose for which each cheque is drawn, or, even with knowledge of what was going on, to be debarred the right of recovering a general balance on an over-drawn account because the moneys sought to be recovered went, in fact, to the maintenance of the other line.

We have not, however, to consider the equity of shareholders to restrain the application of corporate funds to a purpose foreign to the objects of the joint adventure. In such a case they must apply for relief with reasonable promptness, as early as practicable, to prevent the creation of new rights and obligations; and by unexplained delay they create, as has been said, a new equity against themselves

sufficient to bar their claim to relief. The law on this subject is well explained by Lord *Cottenham* in Graham v. The Birkenhead and Lancashire, &c., Railway Company, (2 MacN. & G. 156, 6 Eng. L. & E. Rep. 132,) and was before our Court of Common Pleas, in Moore v. Chambers, (11 C. P. 453.) By lying by and knowingly permitting his directors to expend their own money and moneys borrowed from others on a purpose to which he objects, the Great Western shareholder may bring himself within Lord *Cottenham's* words: "He has permitted things to get into that state which makes the injunction a proceeding not only not enforcing an equity, but calculated to inflict great hardship and injustice."

If therefore the individual shareholders may have lost their right to dispute their directors' proceedings, the case seems far stronger against allowing the corporation as a body to repudiate its own acts on the ground of any alleged illegality. It might be very different if they urged such an objection to a suit against them to compel them to perform, or for damages for not performing, an illegal or *ultra vires* contract. Here, having induced third persons to alter their position by advancing large moneys, they seek to urge it as a bar to their recovery, and to establish their own right to retain such moneys.

I cannot consider the advance of money by the plaintiffs for the purpose of assisting the Detroit and Milwaukee Company as analogous to the well known class of cases where money is lent or given expressly for gambling, or stock jobbing, or other objects declared illegal by statute, or for an immoral or unlawful purpose, such as McKinnell v. Robinson, (3 M. & W. 434,) and cases there cited. Here the legislature had expressly sanctioned one loan to this foreign company, and had permitted loans of money to the same or any other United States road for certain purposes, and I cannot believe the law to be so rigid against parties actually advancing moneys to a company, that where the whole sum *may* be expended in a perfectly legal manner, it cannot be recovered because all or part *has* been expended on objects not warranted by the legislature.

On this branch of the case the facts may not be unfairly stated thus:—The Great Western Railway ask

their bankers to lend them money, alleging that they have resolved to help the foreign road to the extent of £100,000. The bankers look at the statute, and find them authorised so to do for certain purposes, such as "providing proper connections and promoting its traffic." If the diversion of any part of the Great Western Railway funds to aid a foreign road were unsanctioned by law, the defendants' objections would at once assume a more intelligible form. Desiring to preserve untouched the equity of shareholders to prevent any application of the common stock to purposes foreign to the common design, I think it would introduce infinite confusion and uncertainty in commercial dealings, and especially in the relations of banker and customer, to accept the defendants' view of the law in a case like the present.

It is also objected that, although power is given to the defendants to "use its funds" in the foreign company, yet they cannot legally *borrow* money from the plaintiffs for such purpose. A case can readily be supposed of the directors of a company, having expended all their authorised capital, not being authorised to borrow further means to carry on their adventure. Burmester v. Norris, (6 Ex. 796,) cited in the argument, is of that nature. *Alderson*, B., says "It would make a vast difference to the shareholders if the power contained in these words," (viz. that the directors should have sole control in managing the affairs and business of the company,) "were to be construed as imposing on them an unlimited responsibility beyond the capital which they supposed they would have to subscribe, and with which the concern was to be entirely carried on."

Here the act authorising the loan permits an increase of stock to the extent of two millions of pounds, and the creation of a debenture stock, and speaks (sec. 4) of the company's power to issue bonds for borrowed money "whenever it may be by them deemed expedient to avail themselves of the power of borrowing money by such means." The act of 1853, 16 Vic., ch. 99, sec. 3, gives the company power to borrow from time to time, for making, completing, and working the railway, and to make the bonds, &c., issued for securing payment of money so borrowed convertible into stock, &c.

In the Bank of Australasia v. Breillat, (6 Moore P. C. C. 152, 195,) Lord *Kingsdown*, in reference to the case of a public company under a deed of settlement containing no express borrowing powers, says, "We have no doubt at all that in ordinary banking partnerships the power of borrowing exists, and the directors by the terms of their appointment had all the general powers, and among the rest the power of borrowing, unless such power is excluded by other provisions of the deed."

In Maclae v. Sutherland, (3 E. & B. 38,) Lord *Campbell* cites this judgment with great approbation, and adds, "Although mere shareholders in a joint stock company have no authority to pledge the credit of the company, the directors appointed to carry on the business would have impliedly such of the ordinary powers of partners in a common mercantile partnership as are necessary for the carrying on the business for which the company is formed; and, where a joint stock banking company is established, the directors would be considered the agents of the shareholders to borrow money for the ordinary purposes of the business, and to give securities in the ordinary form for the money borrowed." He adds these suggestive words:—"The shareholders may have been very ill-used by the directors, (who are acquitted of any personal misappropriation of the funds of the company,) although it is possible that they may, in common with themselves, have been under the delusive hope that enormous gains would be made from the speculations, * * and that, all concerned being enriched, the engagements of the company would all be honourably fulfilled. But, whether the directors have misconducted themselves towards the shareholders or not, the loss that has accrued cannot, according to our views of the case, be thrown upon the *bonâ fide* creditors of the company."

I cannot doubt the applicability of this view of the law of joint stock banking companies to a railway company. The latter is also a great trading corporation, in daily receipt and disbursement of large monies, executing and maintaining costly works, often called on to disburse large sums, possibly at the moment beyond their available funds in hand. I think their directors must be held to possess all powers

necessary to obtain advances for their business purposes, either on loan or over-drawn account, from their bankers, and that the corporate body which they represent must be as such bound to repay.

I do not feel pressed by any difficulty suggested by defendants' counsel on this branch of the case. Assuming that the company had power to use its funds in aiding the Detroit and Milwaukee Company, I cannot draw any distinction between advances made by their bankers for this or for the general and legitimate purposes of the work:—or, in other words, between the right of bankers to insist on repayment of defendants' overdrawn account for moneys expended on the foreign road and on the Great Western road itself, or for payment of the officers or work-people on the line. The evidence does not present the case of a formal borrowing of a specific sum or sums by way of loan, but the common case of a bank account largely overdrawn, instead of being covered by deposit of moneys or by proceeds of exchange.

I cannot understand any difficulty existing against the right of the bankers of any mercantile or trading company to enforce payment of any balance due them on an overdrawn account, arising in the course of ordinary business, because no bond had been given or document executed, as is usual in the case of a formal borrowing of specified sums.

We have now to consider the manner in which the evidence shews this heavy claim arose.

When the Great Western Railway Company decided on making the first loan to the Detroit and Milwaukee Company, it was expressly provided that the expenditure thereof should be subject to their own control. At this time Mr. Brydges was their managing director, and Mr. Reynolds their financial director. It seems clear that these two gentlemen had the authority of those advancing the money—that is, the shareholders—to control its expenditure. Mr. Brydges in his statement, (at page 86,) and his co-director Mr. Becher, (at page 78,) are explicit as to this. The resolution of the English board, dated the 10th of November, 1857, directs that the expenditure shall be wholly under the control of Brydges and Reynolds. This at least is the light in which the matter is placed by the defendants at the trial.

As already remarked, the plaintiffs had been acting as the defendants' bankers from August or September, 1857, and it was on the 2nd of November of that year that the resolution for the first loan, having been passed in England, was adopted by the stockholders in Canada. Security was required by the form of the resolution.

After some negotiation, it appears that on the 1st of January, 1858, a mortgage was executed by the Detroit and Milwaukee Company, transferring to Messrs. Brydges, Reynolds, and Becher, as trustees, all the real and personal estate, vesting in them the control of the expenditure of the funds necessary to complete the line, and also the management of the railway and disposal of the net income, for assuring the repayment to the Great Western Railway Company of money advanced or to be advanced, with interest at ten per cent.

On the 22nd of January, 1858, Mr. Brydges became President and Mr. Reynolds Vice-President of the Detroit and Milwaukee Railway Company, retaining however their respective official positions in the Great Western Railway Company; and the Detroit and Milwaukee board of directors was remodelled, by placing thereon two of the English board of the Great Western Railway, and one other of the Canadian Great Western Railway board, Mr. Becher, leaving only three American directors; and some $2,500,000 of the Detroit and Milwaukee stock was transferred to the English Great Western Railway board.

On or about the 29th of December, 1857, the negotiation took place between Mr. Reynolds and Messrs. Ross and Park of the Commercial Bank, respecting which there is such a diversity of statement between the first gentleman and the other two, and on which I defer at present making any remark.

Mr. Reynolds, then being financial director of the Great Western Railway Company, informs the plaintiffs' cashier, Ross, of the £150,000 loan, and that he and Mr. Brydges were to superintend its expenditure. An account is proposed to be opened with the plaintiffs; and in Reynolds' own words (page 74,) "I asked him to allow us to open an account against which we could draw." * * "I told him (page 67) that Mr. Brydges

and myself would like to draw to the extent of our requirements in carrying out this undertaking of the Detroit and Milwaukee, and at the end of each month we would cover the amount by bills of exchange on England."

The fact seems to be clear, that these gentlemen procured an account to be opened: that they were to be allowed to draw as they required, paying into the plaintiffs' hands the receipts of the road; and agreed to cover the amount by monthly drafts on their English Great Western Railway Board.

Their first draft, of £6000, under this arrangement is dated 2nd of February, 1858, and is payable to the order of the plaintiffs' manager (Park,) and is addressed to the London Board of Directors of the Great Western Railway of Canada Company, Old Broad Street, London, who are directed to place the amount to the account of the trustees of the Detroit and Milwaukee Company; and the bill is signed C. J. Brydges, Managing Director; Thomas Reynolds, Financial Director.

The transaction thus began; the plaintiffs to be repaid their advances by deposit of the receipts of the Detroit and Milwaukee Company, of which the chief Canadian directors of the defendants were President and Vice-president, and by exchanges drawn on the defendants' London Board.

It may be convenient to notice here, that by the act already cited, 22 Vic., ch. 116, sec. 12, it is declared, after reciting that the defendants had a section of their board of directors in England, that the company has had and shall have power to establish an office in London "for the purpose of regulating and carrying on the business of issuing and transferring shares and bonds, and generally to do all matters and things necessary or desirable in regard to the transferring of *or arrangements connected with the capital of the company held out of Canada, and that all such acts and proceedings shall be considered precisely the same as if carried on in the office of the company in Canada.*"

It may be well to bear this clause in mind in considering the position taken by the defendants at the trial—that the Canadian directors as a board (of course excepting Brydges

and Reynolds,) took no part in the expenditure of these loans to the Detroit and Milwaukee Company.

The account being opened, it would seem from Mr. Reynolds' evidence, (page 67-8) that moneys were chequed out on cheques signed by Brydges and Reynolds, without any addition to their names, till the end of 1858, when printed cheques were used, and countersigned by the secretary and accountant of the Detroit and Milwaukee Company.

A reference to the voluminous particulars will exhibit the progress of the acconnt and its ultimate result in the formidable balance claimed by the plaintiffs. The first exchange given on the defendants' London Board was on the 1st of February, 1858, and the last apparently about the 30th of December, 1858.

It would appear from defendants' evidence that the Great Western Railway Board in Hamilton (except Messrs. Reynolds and Brydges) took no part in this expenditure or dealing with the Detroit and Milwaukee Company, or in drawing the exchange on the London Board, except that when the drafts were accepted in England they came before the Canadian Board by way of return. (See Brydges' evidence, page 86.)

It may be considered as established beyond controversy, that the Great Western Railway Company resolved to advance two large loans to the Detroit and Milwaukee Company, on getting security, and on condition that their own managing and financial directors should wholly control the expenditure : that the required security was given, and the Detroit and Milwaukee Road and all its resources (subject to some prior claims) transferred to the two last named gentlemen and Mr. Becher, their co-director, as trustees: that a new account was opened with the Great Western Railway bankers, and large advances obtained on the agreement that all receipts of the road were to be deposited with the bankers, and the amount behind-hand covered from time to time by sterling exchange drawn by the managing and financial directors as such on the defendants' London Board; and the final result is a very large balance in favour of the plaintiffs, for which this action is brought.

Before discussing the opposing views of the parties as to

whom credit was given to in this newly opened account, I think it fitting to notice the objections of defendants' counsel as to the absence of any assent by defendants evidenced by their common seal to becoming the plaintiffs' debtors. This can best be considered under the assumption that the credit was sought and accorded as the plaintiffs' witnesses represent it, and that the bankers understood they were trusting the Great Western Railway Company, and that the latter acted throughout the dealings as if they considered themselves as responsible.

My very strong impression is that in such a case a liability may be contracted by the directors of a trading and commercial association like a railway company to their bankers, for the re-payment of advances, without the formality of a seal. The current of modern authority seems clearly to run in that direction, and I think this court would be adopting a retrograde course were it to hold otherwise, and would be departing from the views of the law adopted by us in our own Court of Appeal, in the cases there decided, and of the English Queen's Bench in such cases as Henderson v. The Australian Navigation Company, (5 E. & B. 409,) and Reuter v. The Electric Telegraph Company, (6 E. & B. 341.) In the first-mentioned case *Wightman*, J., says, "The general result of the cases seems to be that, whenever the contract is made with relation to the purposes of the incorporation, it may, if the corporation be a trading one, be enforced, though not under seal." Sir *William Erle*, says, "I cannot think that the magnitude or the insignificance of the contract is an element in deciding cases of this sort. * * I think myself that it is most inexpedient that corporations should be able to hold out to persons dealing with them the semblance of a contract, and then repudiate it because not under seal."—But it is not necessary to pursue this subject further. Our views have been so frequently and copiously expressed on this point, that I need only refer to Pim v. The Municipal Council of Ontario, (9 C. P. 304,) and Whitehead v. The Buffalo and Lake Huron Railway Company, (8 Chancery Reports, U. C. 157,) in the Court of Appeal for Upper Canada.

At the trial the only issue raised was never indebted, to a

declaration on the common money counts. After reservation of leave to move on the legal exceptions, certain questions were, after much discussion, submitted by the learned judge to the jury.

The most important was the first, as to whom the credit was given to by the plaintiffs—to the defendants, or to the Detroit and Milwaukee Company, or to Messrs. Brydges and Reynolds personally. The jury found this in favour of the plaintiffs, that in fact credit was given and the money advanced or lent by the bank to the Great Western Railway Company.

I do not see that this leading point of the case could be disposed of except as a matter of fact for the jury on the evidence.

I do not feel pressed with the exception taken to the form of the question, that it should have been "*accepted*" as well as given. In leaving such a common question to a jury, I understand the enquiry involves the whole circumstances of the bargain; and that in finding that credit was given to the Great Western Railway Company I must infer that the jury found such to be the true nature and effect of the dealing between the parties—namely, a pledging of credit and an agreement to accept such pledge, and to make advances accordingly.

Messrs. Park and Ross speak very decidedly as to their view of the agreement, and of their refusal to make advances on the credit of the Detroit and Milwaukee Company. Mr. Reynolds denies this view to be correct. Mr. Brydges adopts his colleague's version so far as his personal knowledge is concerned; but I gather from a perusal of these gentlemen's evidence that their idea would seem to have been that to the extent of the loan or loans voted by the shareholders they were to see the bank repaid.

The letter of the 16th of December, 1858, shortly after the voting of the second loan, and signed by them officially as managing and financial directors of the Great Western Railway Company, states expressly that the Great Western Railway Company "holds itself liable to the Commercial Bank for all overdraft on the Detroit and Milwaukee Com-

pany's account with the said bank. This is quite understood by us; but as you expressed a wish to have it placed on record we now do so by means of this letter."

It is unnecessary to notice any of the arguments at the trial or in term, as to the insufficiency of this letter as "a guarantee." I only regard it as evidence of the parties' own view of the state of the case when it was written.

I have no doubt whatever that in weighing the value of the opposing testimony it had much weight with the jury, when viewed in that light. Mr. Reynolds, (at page 71,) says that when he wrote that letter he supposed he was pledging the Great Western to the payment of the overdraft to the extent of the loan which he and Brydges were empowered to expend on the Detroit and Milwaukee Railway, and that at that date there was about $385,000 due to the bank, and there was a sum of the loan (or loans?) remaining to be expended equal to the balance then due the bank. Again, (at page 75,) he repeats this—that the letter was written to give Campbell (the bank inspector) an assurance "that he would get the balance from the Great Western Railway's unexpended portion of the loans."

Mr. Brydges (at page 84) says the letter was never intended to make the Great Western Railway liable for an unlimited amount of advances; it was to assure them (the plaintiffs) that they would get the balance of the loan; and he adds that he thinks they did get as much as $358,000, (*Qy.* $385.000.)

Again, he says, (at page 87,) "Why it did not occur to me to make this letter different from what it was, is that at the time the second loan was granted we made out a statement, which was sent to London, shewing that at the end of 1859 it was expected that the Detroit and Milwaukee account would be about balanced. We were, however, disappointed in our expectations in regard to the traffic of the line. At the time the letter was written, it was supposed that the unexpended portion of the £100,000 loan would suffice to balance the account." * * "We expected that the traffic of the line and the unexpended portion of the loan would make up the balance." (page 88.)

The account from this time kept on constantly increasing, and over $358,000 (the balance above mentioned) was after that paid, as Mr. Brydges states, into the bank as part of the general account, but not on any particular arrangement on account of the overdraft existing at the date of the letter.

Mr. Brydges also states (page 90) that large sums were paid for coupons, old debts, &c., out of the loans, but he would not admit as much as £100,000. The whole amount of the loans was expended either in that way or in work on the road.

Mr. Reynolds (at page 69) states from a memorandum that $709,850 of the two loans had been paid to the Commercial Bank. This in round numbers would seem to leave about £100,000 of the loans unpaid to the bank.

In the particulars of claim I only find one entry of credit for sterling exchange, amounting to $48,166·66. on the 30th of December, 1858, after the granting of the second loan ; and the account rapidly increases in favour of the Bank from that time.

If the question of credit and liability were properly submitted to the jury, I cannot say that they had not evidence before them to warrant their finding in favour of the plaintiffs.

The defendants' counsel have argued with much force that, assuming Messrs. Brydges and Reynolds to have in fact pledged the credit of defendants, they had no right so to do, and could not thereby bind the corporation.

This again raises the old question as to how a corporation can be bound. I have already expressed an opinion on this point. This trading company must act through certain officers. They resolve to loan money to another company. That money has to be first obtained in England and then transmitted to Canada, to be there expended by certain officers of the lenders' company. Exchange has to be drawn for it, and these officers are appointed to draw such exchange. These officers inform the ordinary bankers of the company of all these facts, and propose and agree (as the jury have found) that if the bankers advance money to the company to be expended as aforesaid on the faith of this arrangement, they, the company's officers, will pay

in all the earnings of the foreign company, and cover all deficiencies by exchange drawn by them on London against the loan.

I am unable to see any sufficient reason for holding such an arrangement to be of no binding effect on the company.

If the facts be as the jury found, is it more than the common case of overdrawn accounts between bankers and corporation customers?

If the London board had sent their manager and financial director to their London bankers with the resolutions, and with the authority above noticed, and on the faith thereof the bankers had given these gentlemen large cash advances, which the latter applied, as their directors had resolved they should do, to the work on the Detroit and Milwaukee line—in such case, in the absence of any express agreement as to the object of credit, could not such advances be recovered from the Great Western Railway company?

Again, if Messrs. Brydges and Reynolds, after communicating to the Commercial Bank in this country all that is proved to have been communicated by them, had drawn exchange on the London board, and obtained from the plaintiffs the proceeds thereof, and applied such proceeds according to their instructions on the Detroit and Milwaukee road, and such exchange had been dishonored, would the Great Western Railway Company be responsible for the cash advanced as for money lent, apart from any formal liability on the bills of exchange as such?

We know that corporate bodies are held liable for money had and received to the use of another, without evidence under seal: that they have been held responsible in trover and false imprisonment, and even for libel, on the acts of their officers, without seal. We know that under the winding up acts, where money was shewn to have been borrowed by a company's secretary without authority, but was proved to have been actually expended on the company's business, it was allowed to the lender. *In re* The Electric Telegraph Company of Ireland, Troup's Case, (7 Jur. N. S. 901,) Hoare's case, (*Ib.*) Also, where a Life Assurance company entered into the Marine Assurance business, although their so doing was

held to be *ultra vires*, *Wood*, V. C., decreed a return of the moneys paid to them for premiums for the void marine risks: *Re* Phœnix Life Assurance Company, Burgess and Stock's case. (7 Law Times Rep. N. S. 191.) He notices in his short judgment the paucity of direct authority on this subject.

It was asked by defendants' counsel on the argument whether the Bank had or had not a claim for their advances against the Detroit and Milwaukee Company, or could the latter, if sued therefor, have successfully contended that the credit was exclusively given to the present defendants.

I have considerd this suggestion, and feel some hesitation in speaking with any precise conclusion on the subject.

In 1860 a sale took place under a Chancery decree of the United States Circuit Court for the state of Michigan. Mr. Gray, a Detroit solicitor, proved that he acted in foreclosing the mortgage held by Messrs. Brydges, Reynolds, and Becher, on the Detroit and Milwaukee road: that on the 6th of August, 1860, an agreement, proved at the trial, was made, (see page 89,) reciting that defendants' (the Detroit and Milwaukee company's) counsel had consented to a sale, and that the trustees above named (who were plaintiffs) agreed with Mr. A. Campbell, as trustee for the Commercial Bank, that the plaintiffs might bid in the property, and that a new corporation under the laws of Michigan should be formed, succeeding to all the property and franchises of the old company: that a seven per cent preferred stock in the new company should be issued to the amount of the debts mentioned in a schedule annexed—the new corporation to pay such debts at periods named: that if the plaintiffs or the new corporation should not pay as agreed the decree might be vacated and held for nought, and that the trustee might interpose and recover said debts, and take all proceedings against all persons or corporations liable as if the decree had not been entered; and declaring that such agreement or any proceedings thereon should not be considered as an election of the remedies of the bank for said debt, but as a means of payment and a proceeding solely collateral.

In the schedule a debt of $1,039,203 98c is set down, which I understand to be the then claim of the Commercial Bank.

The road was sold, and bought in by the trustees, Brydges, Reynolds, and Becher.

Mr. Campbell was inspector for the Commercial Bank. Mr. Ross says that he (Campbell) took this course thinking it best for the bank: that nothing was done by the board thereon then or since.

Of course it can only be on the assumption that the Great Western Railway company were the principal (if not the only) debtors of the Bank for these advances that the latter can recover. Their position is incompatible with any idea of the defendants being only secondarily liable, or as sureties for the Detroit and Milwaukee company. I do not feel that because a claim could be succesfully urged, or a proof be allowed in bankruptcy, against the Detroit and Milwaukee company, we must necessarily conclude that the Great Western Railway company are not therefore the principal debtors. Embarrassing questions may be raised by such a suggestion, but I cannot find that any such can prevent its becoming properly a question of fact as to whom the credit was given to, and to whom was the plaintiffs' money actually lent, and by whom was it to be repaid.

The plaintiffs' position is, that from the beginning the credit was given by them to the Great Western Railway Company: the latter insist that it was given to the Detroit and Milwaukee Company; and the manner in which the accounts were kept is much discussed.

It is quite clear that from the beginning it was understood and agreed on both sides that the new account should be kept distinct from that of the Great Western Railway proper. The reason for this was obvious, and does not of itself afford any clear argument for or against the present claim. The ground work of defendants' proposal to the plaintiffs for advances, was the resolution to advance a specific sum to the Detroit and Milwaukee Company, to be expended by Brydges and Reynolds, and of course such expenditure must be kept distinct from their own proper accounts for their own stockholders with their bankers. So with the proposed manner of meeting the bank's advances—namely, payment of the Detroit and Milwaukee Company's receipts, and sterling

exchange on the London Board on account of the loan. This arrangement, on which there is no controversy, necessitated a distinct keeping of the accounts.

The plaintiffs allege that to keep the defendants' liability in view the account was opened and continued in their books as "*Detroit and Milwaukee Railway Company account—Great Western Railway.*"

A vast mass of cheques, bills, notes, letters, and documents of all kinds, is produced from the very extensive dealings of the parties, extending over two or three years. So long as no difficulty was apprehended between the parties there was little care apparently taken in adhering to any special or formal headings of documents, or additions to official signatures. Once it was settled that the two accounts were to be distinctly kept, it is easy to produce any number of documents from which it could be readily gathered that the Detroit and Milwaukee Company were the debtors of the bank, and on which the actual liability of any other person or body would not appear.

Each of the litigants can produce numberless letters and papers to which signatures are attached simply in the individual names of the writers, or with such names followed by an official designation, just as each may desire to draw an argument from the absence or presence of such an addition. Thus notes were taken in large amounts from the Detroit and Milwaukee Company; bonds were given in certain financial emergencies under the seal of the Great Western Railway Company; in short, whatever document or obligation seemed best calculated to obtain credit or raise money was readily resorted to.

A very careful perusal of all the mass of papers induces me to attach a far less degree of importance to these matters than they possibly have attained in the minds of the very able and zealous advocates of the parties.

Some of the strongest of the letters relied on by the defendants are to be found under dates long subsequent to the often quoted letter of acknowledgment of the 16th of December 1858, when the plaintiffs had pointedly obtained from Brydges and Reynolds the admission of the Great Western Railway Company's liability.

I may instance such letters as that of Sorley, the bank accountant, addressed to the Vice-President of the Detroit and Milwaukee Company, (Reynolds), asking him for a certificate "of the balance due this bank by your company on account as on the 10th instant." This is on the 14th of October, 1859. Again, the letter of Mr. Park of the 10th of November, 1859, referring to the $200,000, "special loan by this bank to the Detroit and Milwaukee Railway Company," and asking for renewals of the notes given therefor, "the bonds of the Great Western Railway for an equal amount being still held by us as collateral until the bill or bills are paid;" and a similar letter of the 15th of the same month.

Something was said, and more was hinted, as to parties connected with the bank having had dealings, either personally or for others, in the Detroit and Milwaukee Company's securities, which were in the market at very heavy discount; and possibly this may account for some of the very lively interest evinced by some of the writers of the letters in evidence, as to the standing, credit, and prospects of this company.

I attach much higher importance to the communications between the parties at or about the time when the account was first opened, and while the origin and true bearing of the agreement were most fresh in the recollection of all parties.

The dealing commenced about the 29th of December, 1857, and depends, firstly, on the verbal testimony already noticed.

Within a few days of this, Messrs. Brydges and Reynolds went to New York, to arrange with certain creditors of the Detroit and Milwaukee Company there. On their return they write a letter to Mr. Ross, dated January 11th 1858, signed by them as managing and financial directors of the Great Western Railway, asking the bank to guarantee certain bills, which they say they had given to Rayner & Clarke, for a claim on the Detroit and Milwaukee Company, which they had settled, they say, "by giving our acceptance of Mr. Trowbridge's drafts on this company," (the Great Western Railway,) setting out the amounts, "each being dated from

Detroit, 8th December, 1857, signed by C. C. Trowbridge, treasurer of the Detroit and Milwaukee Company, and accepted by us as managing and financial directors, respectively, of the Great Western of Canada Company."

I quote this as illustrating the then understanding of the parties, and suggestive of the question whether the bank, having paid the bills at maturity, would on this letter have naturally looked to the Great Western Railway Company for repayment, or to the Detroit and Milwaukee Company, or to Messrs. Reynolds and Brydges personally?

Shortly after, on the 30th of March, 1858, the letter of Brydges and Reynolds is written to Ross, requesting the credit of $100,000, if required, "on our joint Detroit and Milwaukee account here," stating that "the balance against the Great Western Company is now so much reduced, (and will continue steadily to decrease,) that we imagine you will have no objection to the arrangement here proposed. * * We desire to adhere as nearly as we can, in drawing on our English colleagues, to the amount set down in the schedule we prepared for the gradual completion of the works on the Detroit and Milwaukee line; and this proposed credit would enable us to do so without the necessity of postponing claims which could, if promptly settled, be much more satisfactorily arranged;" and they ask this to be submitted to the bank board.

On the 1st of April, 1858, two days after, Mr. Ross answers this favourably, "under the impression that any amount on the Detroit and Milwaukee account not covered by bill at the end of each month, will be (practically) neutralised by a corresponding reduction of general account, under the limit of £50,000, * * that on the 1st of December next the Detroit and Milwaukee account shall be covered in full by exchange or cash. * * We assume that the aggregate amount of the Detroit and Milwaukee account uncovered at each month's end, and of the general account, will not exceed $200,000; but in case of emergency we shall not mind an excess of $25 to $40,000 for a short time." This is addressed to Brydges and Reynolds, directors of the Great Western Railway. The latter answer this letter on the 14th of April, agreeing to the conditions, except as to

the 1st of December limit: "We have every expectation that within six months from this date the Great Western account will be in a condition not to require the open credit which it at present enjoys, and if this expectation should be realized we presume there would be no objection on the part of the bank to carry the Detroit and Milwaukee credit on to the 31st of March next."

This correspondence, so shortly following the opening of the account, and before any difficulty seems to have been anticipated, is valuable for ascertaining what the parties themselves seemed to understand of their respective positions. It certainly is not without great weight towards supporting the plaintiffs' view, that they and Messrs. Brydges and Reynolds then considered that the dealing was directly between the Commercial Bank and the Great Western Railway Company.

At a much later date, on the 25th and 28th of May, 1859, we find letters and statements written by Messrs. Brydges and Reynolds to the bank, which are important as shewing the manner in which the accounts of the two companies are referred to, the liabilities and the net receipts of each, excusing the not giving of sterling exchange, and in the last letter enclosing the notes of the Detroit and Milwaukee Company for large amounts, and Great Western Railway bonds, to be used by Ross in New York as collateral security in endeavouring to raise money on the Detroit and Milwaukee notes. The bank were to get the proceeds of the notes to provide funds in lieu of the sterling exchange which Messrs. Brydges and Reynolds could not then provide.

It is necessary here to notice the argument that Messrs. Brydges and Reynolds personally were those to whom the plaintiffs gave credit when the account was first opened.

I hardly understand the evidence of these gentlemen as leading to that conclusion. Mr. Reynolds says (at page 73) "We opened an account in our joint names as individuals:" and in answer to the question, Was it not for the Great Western Railway? "It was in pursuance of the instructions to expend the money." * * "It was an interim arrangement for the purpose of aiding us in carrying out the instructions

on account of the Detroit and Milwaukee Railway Company. * * We opened the account and made the arrangements with Mr. Ross purely on our own responsibility: we had no instructions whatever to do so for the Great Western Railway Company. To the question, "But was it your own transaction, your own speculation?" *Answer*, "Certainly not." To the question, "Was it the Great Western Railway's business?" *Answer*, "It was the Great Western Railway's business to find the money, but it was our business to spend it."

Mr. Brydges, after denying any authority from the Great Western Railway shareholders to incur liability on their account, (at page 86,) to the question, "How did you look upon the matter yourself—that you were opening an account on behalf of the Great Western, the Detroit and Milwaukee Company, or yourselves?" *Answers*, "Certainly not the Great Western." On this answer of Mr. Brydges, this question suggests itself to me:—Could he carry out his instructions to draw the amount of the loans from England except by exchange, which he must negotiate with parties here, receiving from them the cash proceeds? His directors do not argue that they could repudiate his exchange on them drawn with their sanction. I hardly see, if so, how the cash so given or advanced by bankers discounting the drafts to the company's officers can be looked upon as lent to those officers on their personal credit. It would more naturally seem to be advanced on the credit of the bills being duly honoured by the drawees.

I do not think that on the evidence it can fairly be considered that the credit was given to these gentlemen individually, whatever might be their personal liability (as Mr. Reynolds suggests) if their acts had been repudiated by their principals.

The jury, on this question being left to them, negatived, as I think justly, such a conclusion.

It is almost impossible to comment in full on all the evidence and documents submitted. I must content myself with noticing what seem to me to be the prominent features of the case.

I will now examine the objections taken to the admission of evidence :—

First, in allowing the minutes of the plaintiffs' board of directors to be read on the application of Brydges and Reynolds for the $100,000 credit. This minute is of the same date, the 1st of April, 1858, with the plaintiffs' letter in reply to the application already noticed. The only material difference between the minute and the letter is, that the former speaks of the "application from the Great Western Railway for a credit of $100,000 on their Detroit and Milwaukee account as considered by the board; and again "the understanding being that the aggregate amount of the accounts of the Great Western Railway Company will not exceed £50,000 to £60,000 Cy."

It appears to me that this minute was properly received in evidence as part of the transaction, and that the tendency of modern decisions is clearly in favour of admitting proof of all things done by parties at the time of entering into a contract, to prove their respective understandings of it.

The case in the Exchequer of Milne v. Leisler, (5 L. T. Rep. N. S. 802,) strongly illustrates this. The point was this :—A. applies to B. to purchase goods, representing, as B. contends, that he was buying on account of G. and M.: A. swears that he bought on his own account, and that he intended to ship through G. and M., and would probably pay by their acceptance. The day after the bargain B. writes to his Liverpool agents to enquire as to the standing of G. and M., and stating that A. was making a large purchase of goods for them. This letter was held to be properly receivable as part of the *res gestæ*, and the decision has I think a strong bearing on this and also on the second and fifth objections urged by defendants.

This fifth objection points to the allowance of the document called a bank statement, sent by the plaintiffs' Hamilton agent to the Head office at Kingston, shewing how the account was kept. I see no valid objection to this.

I feel more doubt on the second objection, to the admission of the evidence of the bank directors of what their cashier, Ross, had reported to them as to what had taken

place between him and Reynolds in Toronto when the arrangement was made for opening the account.

In the case last cited *Pollock, C. B.*, says "It is certain that a mere statement, as when a person returns, for instance, from the Exchange to his counting-house, and says, 'I have sold such and such things,' that would not be evidence of the fact."

But in the present case we have to consider the position of the parties. A very serious contract is under discussion between Reynolds and the cashier, Ross. The latter was not dealing for himself, but, as all parties well knew, as the agent of a corporate body, with a board of directors who could either sanction or repudiate his acts, and to whom he would have to report his proceedings for approval.

On looking back to the evidence, it may be truly said that it amounts to very little, and can hardly have weighed seriously with the jury.

Three directors were examined. Dr. Robertson's evidence is quite unimportant: he says nothing on the disputed point. Mr. Strange's testimony merely amounts to this, that, as he supposed, the directors sanctioned a loan to the Great Western Railway Company. Mr. A. J. Macdonell's evidence seems alone open to the objections urged. He states, in substance, that Mr. Ross usually reports all important matters to the board for approval, and that on his return from Toronto, after the interview, he reported that credit was to be given to the Great Western Railway Company; and that the board would never have consented to giving a credit to the Detroit and Milwaukee Company, and that he never heard that such a thing had been asked. But, on further examination, Mr. Macdonell evidently could not remember any distinct report made to the board, or discussion of the matter on Ross's return, and the impression left on my mind from perusing his answer is, that it is uncertain whether he heard this from Ross in the form of a report to the board, or on one of the occasions of which he speaks:— "Sometimes (page 57) I am not present at the board meetings, but I have conversations with Mr. Ross on the affairs of the bank almost daily;" and to the question, on cross-

examination, "Have you any very distinct recollection of this matter being discussed when Mr. Ross returned?" he replies "There were so many things submitted that I cannot remember it very distinctly."

I think this evidence cannot be upheld except on the principle of a report or return made by an officer or cashier of a public company in the course of his duty to his superiors, with whom lay the power of approval or disapproval of his acts. Mr. Macdonell's evidence very faintly, if at all, places it in this light. I presume he and his co-directors could be properly examined to prove that they as directors never sanctioned or heard of any proposition to lend money to the Detroit and Milwaukee Company, or to any other but the Great Western Railway Company, and it is a step very slightly in advance of this to state that from their cashier's report to them they understood the matter in that light.

If at the time of the negotiation between Ross and Reynolds it was an understanding of the parties that the proposed credit (to whomsoever given) should be referred to the Commercial Bank board, it will naturally seem that Ross's carrying out such understanding would be fairly considered as part of the *res gestæ*.

In Ross's evidence, on cross-examination, (page 38), he is asked thus: "It seems to have been understood between these gentlemen that a reference of these matters to the board was necessary before any definite arrangement could be made. You could not of yourself grant a credit to Messrs. Brydges and Reynolds without a reference to your board?" *Answer*—"I was in the habit of referring matters of consequence to the board, for the sake of advising with the directors upon them."

Again, at page 39, "Did you lay the schedule before the board?" *Answer*—"Not that I remember. * * I explained the matter to the board, and in the minutes of the 31st of December there is an allusion to it. * * I told Mr. Reynolds I had no doubt that the arrangement would be carried out."

It would thus appear that Ross would be by all parties naturally intended to report all this to his board for approval,

to complete the transaction, and therefore I have come to the conclusion—not however without some hesitation—that as part of the *res gestæ*, as "a declaration accompanying an act," his report to his directors was admissible. See Starkie on Evidence 52–3.

I desire to adopt the most liberal construction of the rules of evidence. Infinite mischief has been done for generations by errors on the opposite side. I think that as the law is now administered we are safe in adopting the less stringent rule. I repeat however that I attach but slight importance to the evidence now objected to, and can hardly believe that its reception in any way whatever influenced the result.

The third objection to evidence is as to receiving the copies of the proceedings of the Great Western Railway London Board, without its appearing that such documents were in fact copies of the original proceedings: "the only evidence of there being copies, or that there ever were such documents, being that of defendants' secretary, that said copies were sent to this country by the officers of the company in England as such copies, but whether they were copies or not he did not know."

I think the objection stated in the rule gives its own answer in the words above quoted. The secretary of the directors here proves the official receipt of such documents by the Canadian board, to be treated by them as official and authoritative. I should be sorry that such a mode of proof could be found to be objectionable.

The last objection to evidence requiring notice is number 4, as to the admissibility of what was called the "Red Book," of charges against and answers by the directors of the Great Western Railway.

In my view of the case I attach little or no importance whatever to this book or its contents. On the evidence of Messrs. Muir and Stephens (at pages 47 and 48,) it is shewn that these red books were sent out by the English Board to the Canadian Board. Mr. Stephens, the defendants' secretary, says they were circulated here when received among the shareholders as the report of the company, and he points to minutes of the Board here bearing on the subject of this

report. I think it was fairly receivable in evidence, as a document adopted and circulated by the defendants' board here.

I therefore think that there is no ground for a new trial for the reception of improper evidence. I have already stated my views as to the various legal exceptions taken against the maintenance of the action, and I think they apply to nearly all the voluminous objections in the rule to shew cause.

Before summing up my views I should perhaps notice the objection to one of the questions submitted to the jury: namely, as to the Great Western Company "reaping the benefit" of the expenditure of the plaintiffs' money on the Detroit and Milwaukee line.

It is said that such a question was too vague and general. If the question were proper in any shape, it is not easy to see how it could be framed in a less objectionable form.

The decision at which I have arrived does not depend upon the finding of the jury on that point, and would be the same had such a question been omitted from those submitted to them.

It is needless to premise, that in a matter so complicated as this has become, in the dealings between these companies, and in the rather unsettled state of the law for many years past as to the rights and powers of corporations to contract otherwise than under seal, an opinion formed on the points submitted for our judgment can hardly be delivered without some hesitation.

On the best consideration that I have been able to give to the case, I have arrived at the following conclusions:—

That the first loan of £150,000, sterling, to the Detroit and Milwaukee Company, was sanctioned by the subsequent act of parliament, and declared in express terms to be valid:—

That as to the second loan, of £100,000, sterling, there was nothing on the face of the resolution to shew that it was to be expended in a manner contrary to law:—

That on the faith of these resolutions, and of the arrangements made by the two managing directors of defendants,

the Commercial Bank agreed to open the account, which they call "The Detroit and Milwaukee Railway account, Great Western Railway:—that they, then and previously being the general bankers of the Great Western Railway, continued to advance large moneys on this account; and the mode by which they were to be repaid such advances was by paying into them all the traffic receipts of the Detroit and Milwaukee Company, and covering the deficiency from time to time by drafts, in sterling exchange, drawn by the Great Western Railway officers here on the then English Board:—

That of the two loans, of £250,000, they in fact have only received about $700,000, leaving about £100,000 sterling thereof which never reached them:—

That the advances continued to be made for over two years, till a very large balance remains due to the plaintiffs:—

That it was a question of fact to be decided by a jury, and not a legal matter for the court, as to whom and on whose credit the bank really advanced its money—whether to the Detroit and Milwaukee Company, to Messrs. Brydges and Reynolds individually, or to the Great Western Railway Company:—

That there was evidence to go to the jury on this point, although the common seal of the Great Western Railway Company was not used to sanction the acts of its officers or directors, or to shew the assent of the corporation to the liability:—

That for the reasons previously given there is no objections to the bankers recovering the balance due on the ground that such an expenditure was beyond the statutable powers of their customers as a chartered company:—

That there is no ground for nonsuit or for new trial for misdirection or admission of improper evidence:—that the questions submitted to the jury by the learned judge were substantially calculated to aid the jury in determining the issue joined, and are not open to serious objection.

And as to the merits, I see no safe ground on which the court can determine that the jury found for the plaintiffs, either without sufficient evidence or against the weight of evidence.

As I understand, the question of amount was agreed to be settled by a referee, who could state a case, if required, to the court. I do not feel it necessary to do more than express my view of the principles by which I consider the case to be governed.

It is satisfactory to feel that in a case of this magnitude the opinion of a Court of Error can be taken on the serious questions involved.

McLean, J.—concurred, and said that he had been desired by Mr. Justice *Burns* to state that he also fully agreed in the judgment just delivered.

Rule discharged.

THE

SYSTEM OF LANDED CREDIT

OR

LA BANQUE DE CREDIT FONCIER